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CLERK

2/8/2016

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GREER LORRAINE DENNIS
and SCOTT FEIGELES,

Vs.

PHARMERICA CORPORATION, et als.

. Civil No. 15-CV-05966-LDH-GRB

.

.

. 100 Federal Plaza

. Central Islip, NY

. January 19, 2016

.

TRANSCRIPT OF CONFERENCE
BEFORE HONORABLE GARY R. BROWN
UNITED STATES DISTRICT MAGISTRATE

APPEARANCES:

For The Plaintiffs:

HELEN F. DALTON & ASSOCIATES PC

By: PUJA SHARMA, ESQ.

69-12 Austin Street

Forest Hills, NY 11375

For The Defendants:

WINSTON & STRAWN

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Colloquy

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1 THE CLERK: Calling case civil 2015-5966, Dennis
2 versus Pharmerica Corporation. Counsel, please state your
3 appearance for the record.

4 MS. SHARMA: Puja Sharma from Helen Dalton &
5 Associates for the plaintiffs.

6 THE COURT: Keep your voice louder, make sure mic is
7 on and I need you to say your name again.

8 MS. SHARMA: Puja Sharma from Helen Dalton &
9 Associates for the plaintiffs, Your Honor. Good morning.

10 THE COURT: Good morning. It's Ms. Sharma, yes?

11 MS. SHARMA: Yeah.

12 THE COURT: Okay. Counsel?

13 MR. BLACKSTONE: Good morning, Your Honor, Shane
14 Blackstone from Winston & Strawn for the defendants.

15 MR. SMITH: Aubrey Smith from Winston & Strawn for
16 the defendants as well.

17 THE COURT: All right. Welcome, everyone. Ms.
18 Sharma, why don't you tell me about the case?

19 MS. SHARMA: This is an age discrimination case under
20 the ADA and the New York State Human Rights law. Both
21 plaintiffs were alleging that they were fired due to their age
22 once new management took over at Oncomed in about --

23 THE COURT: I'm sorry, Ms. Sharma, I'm really
24 struggling to hear you. Is the green light on, on the mic?

25 MS. SHARMA: Yes.

Sharma/Argument

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1 THE COURT: Then you need to pull it much closer.

2 MS. SHARMA: Okay.

3 THE COURT: And remember that I don't want to miss a
4 single syllable of what you have to say so let me have it. Go
5 ahead.

6 MS. SHARMA: Is this better?

7 THE COURT: Yes, it's better, go ahead.

8 MS. SHARMA: Okay. Both plaintiffs were working at
9 Oncomed Pharmacy. One started in 2005, the other in 2009.
10 They both allege that they were fired due to their age after
11 new management took over. They had never been written up or
12 disciplined prior to that. So they were terminated for,
13 basically due to their age. The policy in the company once new
14 management took over was to let go of older employees and hire
15 new or younger employees.

16 THE COURT: Okay. And how much money is at issue
17 here?

18 MS. SHARMA: Presently, we are claiming one million
19 for each plaintiff.

20 THE COURT: Okay, based on what?

21 MS. SHARMA: Loss of income, loss of future earnings
22 and I think that's it, Your Honor.

23 THE COURT: Okay. What were they doing for the
24 company? You may have said that but I may have missed it. I'm
25 sorry.

1 MS. SHARMA: Ms. Dennis was an intake coordinator and
2 also did insurance investigation work in addition to other
3 miscellaneous tasks and Scott was a pharmacist.

4 THE COURT: Okay. And what did they earn in those
5 roles?

6 MS. SHARMA: Off the top of my head, I don't know.

7 THE COURT: Okay. Have they found work since?

8 MS. SHARMA: I believe so, but I'm not sure.

9 THE COURT: Okay. Important facts because we have to
10 know what the differential is, right, to know if we're going to
11 get somewhere, yes?

12 MS. SHARMA: Yes, Your Honor.

13 THE COURT: So without that information, it's hard
14 for me to sort of figure out a good path but we'll do what we
15 can. All right, let me hear from counsel.

16 MR. BLACKSTONE: Good morning, Your Honor. Your
17 Honor, the defendant's position is first their employer is one
18 of the defendants, Sina Drug, also known as Oncomed. Both
19 plaintiffs were terminated for reasons that had nothing to do
20 with their age.

21 THE COURT: Wait, let me slow you down a bit. When
22 you say one of the defendants was their employer?

23 MR. BLACKSTONE: Yes, Your Honor. They have named a
24 minority owner of the employer defendant as a defendant as
25 well.

Blackstone/Argument

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1 THE COURT: Okay.

2 MR. BLACKSTONE: And that company is called
3 Pharmerica Corporation but the plaintiffs were never employed
4 by that entity and the complaint does not allege that they were
5 employed by the entity.

6 THE COURT: So is it your suggestion that Pharmerica
7 is not a proper defendant?

8 MR. BLACKSTONE: Yes, Your Honor.

9 THE COURT: And is the proper defendant named?

10 MR. BLACKSTONE: Yes, Your Honor.

11 THE COURT: Okay. What are we doing about those
12 other, about the other allegedly improper defendant?

13 MR. BLACKSTONE: Your Honor, I've raised the issue
14 with plaintiff's counsel and they believe that given the
15 status, they understand that Pharmerica Corporation is the
16 parent company of the employer of the plaintiffs and believe
17 that as a result they're a proper defendant so our view would
18 be that we would be looking for an early dispositive motion to
19 remove Pharmerica Corporation from the case as it resolve.

20 THE COURT: Ms. Sharma, do you have reason, I mean do
21 you have case law that supports the notion that a parent
22 corporation should be sued in this circumstance?

23 MS. SHARMA: Our clients told us that they were in
24 charge of putting in new management so to speak, the parent
25 company. So the way it was explained to me was that they also

Blackstone/Argument

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1 had a role in hiring new management to take over and input some
2 of these policies. That is why we wanted some more discovery
3 to figure out if they actually were, if they actually had any
4 role in the discrimination or not.

5 THE COURT: Let me ask you a question. The company
6 they actually work for is what?

7 MS. SHARMA: It was called Oncomed.

8 THE COURT: Okay, is that a company that's sort of
9 financially marginal or is it a substantial entity?

10 MS. SHARMA: I don't know that, Your Honor.

11 THE COURT: Okay. Can you answer that question, Mr.
12 Blackstone?

13 MR. BLACKSTONE: I don't have the details concerning
14 the defendant's financial situation.

15 THE COURT: Okay. Because I'm assuming it's a
16 solvent --

17 MR. BLACKSTONE: It is a solvent entity.

18 THE COURT: Right. I mean if they're not judgment
19 proof, I'm not sure that we need to spend a lot of time arguing
20 about Pharmerica's role, right? I mean, in other words, it's
21 going to delay your case while that gets resolved, although
22 Judge Wexler keeps things moving on both tracks, if it's a
23 pointless exercise, you should think about that and maybe come
24 to some agreement with counsel on that point or not. It's up
25 to you, right? Do you believe counsel that the appropriate

Blackstone/Argument

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1 defendant would agree that plaintiffs would not be prejudiced
2 by dismissing against Pharmerica?

3 MR. BLACKSTONE: I agree that they would not be
4 prejudiced by dismissing Pharmerica Corporation.

5 THE COURT: Right. So in other words, you're not
6 going to come to me two months from now and said, oh well, now
7 we can't do discovery on this issue because now that Pharmerica
8 is out of the case, we're not going to let them have these
9 files.

10 MR. BLACKSTONE: That's correct, Your Honor.

11 THE COURT: Okay. So I don't know that there would
12 be a practical problem. I know there won't be a discovery
13 problem. So talk to whoever you have to talk to and think
14 about that. If we can move the case a little bit faster, it
15 would be good for everybody.

16 MS. SHARMA: Thanks, Your Honor.

17 THE COURT: After all, the Chief Justice of the
18 United States Supreme Court has urged us to make litigation
19 faster and more cost efficient so we're all trying. It's up to
20 you guys, too. So try to work that out. What else?

21 MR. BLACKSTONE: Your Honor, just on the merits of
22 the claim, Your Honor, defendant Onco's position is that
23 defendant Dennis, or I'm sorry, plaintiff Dennis who is in the
24 customer service role was terminated because the decision was
25 made to replace persons in a customer service role with

1 certified technicians who had degrees, medical related degrees
2 and plaintiff, Dennis did not, the reason being that it would
3 provide greater customer service to people calling in. This is
4 sort of a specialty pharmacy operation and it would improve
5 their business and customer relations to have certified
6 individuals in that role.

7 And plaintiff, Feigeles was terminated for
8 misconduct.

9 THE COURT: Okay, tell me about that.

10 MR. BLACKSTONE: Your Honor, it was discovered that
11 he had engaged in improper billing practices. He was
12 responsible for billing for pharmaceutical drugs that he was
13 filling and he was engaged in misconduct in terms of how he was
14 billing them. He was not billing them accurately and he was
15 doing so, he was intentionally not billing accurately.

16 THE COURT: Why? Was he profiting from that?

17 MR. BLACKSTONE: My understanding he wasn't
18 personally profiting from it but it made his job easier because
19 if he billed it in an appropriate way, and the billing was
20 rejected, it would sometimes be more difficult or require more
21 paperwork to have it billed, have that billing anomaly
22 corrected as opposed to if he just changed how he was billing
23 it, inserted different codes for example so that he could then
24 get the charge through.

25 THE COURT: Is there a good HR record in terms of

Blackstone/Argument

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1 progressive discipline or anything like that?

2 MR. BLACKSTONE: My understanding, Your Honor, is
3 that the severity of this incident was discovered and he was
4 terminated as a result of what was discovered to be a pattern
5 of improper billing.

6 THE COURT: How long had these employees been with
7 this company, do you know?

8 MR. BLACKSTONE: I believe that one of the plaintiffs
9 had been there for about nine years and the other about seven
10 years.

11 THE COURT: Okay. Now, you said Dennis was replaced
12 with someone more qualified, is that essentially the argument?

13 MR. BLACKSTONE: Someone who had like a certified
14 medical degree.

15 THE COURT: So was he terminated, was it for cause
16 termination?

17 MR. BLACKSTONE: The customer service role was not a
18 for cause termination. No, Your Honor, it was sort of more of
19 a layoff reorganization's type of lay off and I believe, you
20 know that she was offered, you know, some severance as a result
21 of that but she did not avail herself to that.

22 THE COURT: That was my next question. Was there a
23 release, right? You should have had a severance package. All
24 right. Fine. We have a discovery plan worksheet. These are
25 adjoined dates, counsel?

Blackstone/Argument

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1 MR. BLACKSTONE: Yes, Your Honor.

2 MS. SHARMA: Yes, Your Honor.

3 THE COURT: Okay, good. Mr. Blackstone, you have not
4 been here before, is that correct?

5 MR. BLACKSTONE: That's correct.

6 THE COURT: In my court, yes?

7 MR. BLACKSTONE: That's correct.

8 THE COURT: Welcome and besides that, Ms. Sharma may
9 have heard me give this speech in the past because you have
10 been here before if I remember. This case is assigned to Judge
11 Wexler. What that means is this last date on the sheet, right,
12 the October 19th date, is written in blood, carved in stone.
13 Whatever analogy you want to use for a sense of finality, use
14 that in your mind. Because you can come to me in September say
15 of this year with the greatest excuse ever articulated in a
16 federal courtroom and I will listen. I will be sympathetic.
17 No, I will be empathetic. I will feel your pain but please
18 remember, there's nothing I can do to help you because Judge
19 Wexler doesn't authorize me to change that last date.

20 The internal dates I'm happy to have you manage
21 yourselves, meaning you want to change one of these dates if
22 you agree, we actually agree, make 5/19 6/19 whatever it is,
23 I'm basically going to sign off on it unless I have an issue,
24 if you don't. But if you want to change his last date, not
25 only can't I help you, don't even bother talking about it. Go

1 to him and good luck with that. But most likely you'll be
2 trying this case in November. So get ready for trial. You
3 have a very short window to get ready for trial. I know you
4 have a partially dispositive motion. He's going to keep
5 everything running, meaning we're going to do discovery at the
6 same time. It's not going to stop anything.

7 You may be thinking to yourself well, I'll simply
8 make a really fine, powerful, weighty summary judgment motion
9 and knock this thing off. It's not going to happen. He might
10 just say oh, we'll do that after the trial or, you know
11 something like that. Get ready to try the case at the end of
12 this year because that's almost certainly what's going to
13 happen, all right?

14 But let's talk about an alternate path because I'm
15 given these cases for two reasons, one is to manage discovery,
16 the second is to try to figure out if there is some other
17 resolution. And that's where my Phase 1 discovery comes in.
18 The date that you've given me, 3/18 date to that category, what
19 I ask you to do between now and 3/18 is to exchange that which
20 you really need to have an intelligent discussion about
21 settlement. No one can be forced to settle but it's often a
22 good opportunity and I try to do it early before we sustain a
23 lot of litigation costs and angst and people get hardened in
24 their positions and it gets nasty.

25 All right, so before all that, we'll come in here and

1 we'll have a settlement conference. Now, please check my
2 rules. I have very particular rules about a settlement
3 conference. You have to have clients here. Now, Ms. Sharma,
4 that's easy. We know who your clients are. They need to be
5 here. Mr. Blackstone, we know who your clients are in part,
6 corporations so we'll need humans here.

7 And they must be humans with real settlement
8 authority, okay, meaning that sometimes things change during
9 the conference and we have to, they have to react to facts and
10 they have to have the ability to change their position. No,
11 no, I got \$10 in the bag and that's it. It has got to really
12 be, you figure out who that person is, make sure it's the right
13 person, okay?

14 You can also provide ex parte submissions to me prior
15 to the settlement conference. You don't serve them. You don't
16 file them. It's a short up to say two or three pages. Letter
17 to me, telling me your plan for settling the case. The more
18 specific you are, the better our results usually are. And I
19 assure you that I will not share that with the other side until
20 and unless you authorize me to share it. It could also contain
21 significant facts. Judge, you should know this. You should
22 know this about billing practice. You should know this about
23 his history that, whatever it is. You can let me know, okay?

24 All right. So we will enter this discovery plan
25 worksheet as the discovery order in the case that's right, you

Blackstone/Argument

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1 just magically was converted to an order while you were sitting
2 here. That's how the law happens. What else do we need to do
3 today, counsel?

4 MR. BLACKSTONE: Your Honor, the parties have
5 discussed this sort of initial round of discovery. I'm not
6 sure if Your Honor wants us to discuss that now or --

7 THE COURT: It's a good idea. So what are you going
8 to exchange?

9 MR. BLACKSTONE: We have a list of documents that
10 we've agreed upon for both sides, a list of categories of
11 documents and there's a disagreement on one category of
12 document that the plaintiff has requested. So I would defer to
13 plaintiff's counsel to introduce that.

14 MS. SHARMA: We have requested, --

15 THE COURT: Ms. Sharma, what do you want?

16 MS. SHARMA: -- a list of personnel terminated over
17 the age of 40 from the company within the last three years. We
18 believe it would be helpful to establish that this was a
19 willful and widespread policy going on at the time. I think it
20 would be helpful to both sides because if they release this
21 list and it shows that there weren't significant terminations
22 over 40 then it would be helpful to them and for settlement
23 talks as well.

24 THE COURT: What's your objection?

25 MR. BLACKSTONE: Your Honor, on a number of grounds.

1 First, I think it's unduly burdensome for purposes of the
2 limited purpose of getting ready for a settlement conference.
3 It doesn't have anything to do with the reasons that the two
4 plaintiffs were terminated. It's not limited, you know we have
5 significant concerns that it would, you know perhaps never be
6 discoverable, but in the event it ultimately is discoverable,
7 we think it would only be appropriate in a more limited
8 timeframe. They've only alleged that older people were
9 terminated starting in December 2013, not for a three year
10 period.

11 They haven't limited the request to similarly
12 situated individuals at the company. And I guess more
13 importantly in terms of overall relevance, it's not obvious to
14 me how a list of people who are terminated over the age of 40
15 or a list of all people who are terminated for that matter
16 really tells you anything about the reasons those people were
17 terminated, from what population they were terminated and all
18 those things which leaves us to a much greater discovery issue.

19 THE COURT: Right. So let me ask you a question
20 though, counsel. You did mention one of the individuals was
21 terminated as part of a reduction force in part.

22 MR. BLACKSTONE: Part of a reorganization of our
23 group, yeah.

24 THE COURT: I mean so if you had the list of people
25 who left during reorganization and they were all 57, that would

1 be an interesting fact potentially.

2 MR. BLACKSTONE: Potentially.

3 THE COURT: Potentially. But of course it is 2016
4 and the rules have changed, right? It used to be as I said
5 relevance, forget it but now the rules tell us we have to look
6 at relevance and proportionality. So let's start with
7 proportionality. How big a company is this? How many
8 employees are we talking about?

9 MR. BLACKSTONE: I don't have a specific number, Your
10 Honor.

11 THE COURT: Give me a ballpark. Is it 7? Is it 70?
12 Is it 700? Is it 7,000?

13 MR. BLACKSTONE: I think it's a couple hundred.

14 THE COURT: A couple hundred, okay. So the list of
15 people terminated, I would not give her a three year period but
16 say over a one year period might be what, a two digit number?

17 MR. BLACKSTONE: I would anticipate it in that range.

18 THE COURT: Yes, so that doesn't sound like it's
19 overly burdensome from proportionality standpoint, is that
20 fair?

21 MR. BLACKSTONE: It's fair but I think I have my
22 broader concern is that it doesn't tell us anything useful for
23 purposes of a settlement conference --

24 THE COURT: I agree that it is not relevant for the
25 purposes of the settlement discussion. What I'm going to say

1 is, if you don't settle the case and we roll into phase rule
2 and we've got very short windows here so I want to make sure
3 we're clear at the beginning. I will direct you to turn over
4 the list of all employees terminated within a year of the
5 termination of these individuals but that will be after the
6 settlement conference, okay, because they have to follow up on
7 that and there might be depositions, whatever.

8 Because if you have a different proposal in that, in
9 other words you say, okay, but Judge we want to limit that to
10 the pain killer division. I'm making something up. I don't
11 know how the, I'll hear you, right? But I eventually will be
12 directing you if we go forward to give them similarly situated
13 individuals because that strikes me as in the realm of
14 something we're going to have to explore if this thing is going
15 to go to trial, okay?

16 MR. BLACKSTONE: Understood.

17 THE COURT: So Ms. Sharma, not in anticipation of the
18 settlement but you'll get that eventually if we're going to
19 fight. Maybe we're going to fight. I'm always optimistic. I
20 hope not. I hope we can work something out but we'll see.
21 What else?

22 MS. SHARMA: I think that's it, Your Honor.

23 THE COURT: Okay.

24 MR. BLACKSTONE: That's all from us, Your Honor.

25 THE COURT: All right. Give me a confidentiality

1 order, there's one attached to my rules that saves some time if
2 you want but you can write your own as well if you want to. I
3 just if I see mine, I sign it right away because I wrote it.
4 All right. Very good, nice people all of you. Nice seeing you
5 again. Have a good day.

6 MS. SHARMA: You too, thank you, Your Honor.

7 MR. BLACKSTONE: Thank you, Your Honor.

8 * * * * *

9 **C E R T I F I C A T I O N**

10 I, Tracy Gribben, court approved transcriber, certify
11 that the foregoing is a correct transcript from the official
12 digital audio recording of the proceedings in the
13 above-entitled matter.

14

15 /s/ TRACY GRIBBEN

16 TRACY GRIBBEN TRANSCRIPTION, LLC DATE: February 8, 2016

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